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No. 08-660

In The Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
IRWIN EISENSTEIN,

Petitioner,

v.

CITY OF NEW YORK,
MICHAEL BLOOMBERG,
JOHN DOE, JANE DOE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Where the United States elects not to proceed with a *qui tam* action under the False Claims Act, and the relator instead conducts the action for the United States, must a notice of appeal be filed within the 60-day period provided for in Fed. R. App. P. 4(a)(1)(B), applicable when the United States is a "party," or the 30-day period provided for in Fed. R. App. P. 4(a)(1)(A)?

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BRIEF FOR PETITIONER

Petitioner respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dismissing the appeal as untimely, is reported at 540 F.3d 94 (2d Cir. 2008). (Pet. App.[1] 1a-15a.) The opinion of the United States District Court for the Southern District of New York is unreported. *See* No. 03 Civ. 413 (DAB), 2006 WL 846376 (S.D.N.Y. Mar. 31, 2006) (reprinted at Pet. App. 16a-43a).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 19, 2008. (JA[2] 19.) A timely petition for a writ of certiorari was filed on November 17, 2008. This Court granted the petition on January 16, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] "Pet. App." refers to the Petitioner's Appendix filed in this Court with the petition for a writ of certiorari on November 17, 2008.

[2] "JA" refers to the Joint Appendix filed in this Court.

STATUTES AND RULES INVOLVED

1. 31 U.S.C. § 3730(b)(1):

   A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

2. 31 U.S.C. § 3730(c)(3):

   If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

3. Fed. R. App. P. 4(a)(1)(A):

   In a civil case, . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

4. Fed. R. App. P. 4(a)(1)(B):

   When the United States or its officer or agency is a party, the notice of appeal may be

filed by any party within 60 days after the judgment or order appealed from is entered.

5. Fed. R. Civ. P. 17(a):

(1) An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

STATEMENT

A. Introduction

A notice of appeal must be filed within 60 days after entry of judgment when the United States (the "Government") is a "party" to the action. *See* Fed. R. App. P. 4(a)(1)(B); 28 U.S.C. § 2107(b). The notice of appeal must otherwise be filed within 30 days after entry of judgment. *See* Fed. R. App. P. 4(a)(1)(A); 28 U.S.C. § 2107(a). In this case, the notice of appeal was filed 54 days after entry of judgment. The issue presented here is whether the 30-day or 60-day deadline applies in a *qui tam* action under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.*, where the Government elects not to proceed with the action and the relator instead conducts the action for the Government.

Four circuits have applied the 60-day deadline in these circumstances. *See Rodriguez v. Our Lady of Lourdes Med. Ctr.,* 552 F.3d 297, 300-02 (3d Cir. 2008); *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999); *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (9th Cir. 1996), *cert. denied,* 520 U.S. 1211 (1997). Besides the Second Circuit here, only one circuit has applied the 30-day deadline, in a case pre-dating the 1986 amendments to the FCA. *See United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327,

1329 (10th Cir. 1978), *cert. denied,* 444 U.S. 839 (1979).

Petitioner, Respondents, and the Second Circuit all agree that the Government here is, at a minimum, a real party in interest. Indeed, notwithstanding its decision to decline intervention in a *qui tam* action, the Government still owns the claims alleged and is entitled to the bulk of any recovery. The question is what additional condition, if any, must obtain in order for the Government, as a real party in interest, to be a "party" under Rule 4(a)(1)(B).

In Petitioner's view, the only other condition for "party" status is compliance with the requirement, which appears in both the FCA and Federal Rule of Civil Procedure 17(a), that the action be brought "in the name of" the Government – that is, that the Government be identified in the case filings as the party plaintiff. The Third, Seventh, and Ninth Circuits have adopted this view; the Fifth Circuit, though acknowledging such identification, has applied the 60-day deadline to avoid risk of confusion. While the naming requirement is formal, its purpose is important: to ensure that the Government is bound by the judgment in a *qui tam* action and that the defendant is protected from subsequent civil litigation by the Government. Because the Government, as a real party in interest, was named in all filings here as plaintiff and was therefore bound by the judgment, the Government was a "party." The notice of appeal was accordingly timely.

In its decision dismissing the appeal as untimely, the Second Circuit held that a real party in interest, to be a "party," must be "the person participating in the proceedings with control over litigation." (Pet. App. 8a.) The court ruled that, having decided not to proceed with the action, the Government "played no role in this matter before the district court." (Pet. App. 13a.)

The Second Circuit's definition of "party," aside from having no support in the language of the appellate rules and ignoring the naming requirement, relies on uncertain concepts of "participation" and "control," and therefore is not suited to determine a jurisdictional filing deadline. The likelihood of debate about whether the Government did or could participate in and control the declined *qui tam* action renders the Second Circuit's definition an unworkable test for appellate jurisdiction. Furthermore, the Second Circuit's holding failed to acknowledge that, even without intervening, the Government has an array of special rights to participate in and control the *qui tam* action. Accordingly, the judgment of the Second Circuit should be reversed.

B. *Qui Tam* Actions Under the FCA

The FCA imposes civil liability on anyone who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval . . . ." 31 U.S.C. § 3729(a)(1). A person who

violates the FCA is liable to the Government for treble damages and civil penalties. *Id.* § 3729(a). An FCA action may be brought in two ways. The Attorney General may bring an action, *id.* § 3730(a), or, under the FCA's *qui tam* provisions,[3] a private person (known as a "relator"[4]) may bring an action "for the person and for the United States Government." *Id.* § 3730(b)(1). "The [*qui tam*] action shall be brought in the name of the Government." *Id.* The *qui tam* action may not be dismissed without the consent of the Attorney General. *Id.*

The *qui tam* complaint and the relator's material evidence must be served on the Government under Federal Rule of Civil Procedure 4. *Id.* § 3730(b)(2). The complaint is filed under seal for 60 days. *Id.* The Government "may elect to intervene and proceed with the action within the 60 days after it receives both" the complaint and the material evidence. *Id.* Before the 60-day period expires, "the Government shall – (A) proceed with the action, in which case the action shall be conducted by the Government; or (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(4). Once

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[3] "*Qui tam*" is shorthand for the Latin formula "'*qui tam pro domino rege quam pro se ipso in hac parte sequitur,*'" which means "'who pursues this action on our Lord the King's behalf as well as his own.'" *Vermont Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 768 n.1 (2000).

[4] *See Stevens,* 529 U.S. at 769.

a *qui tam* action is filed, "no person other than the Government may intervene or bring a related action based on the [same] facts . . . ." *Id.* § 3730(b)(5).

If the Government "proceeds" with the action, "it shall have the primary responsibility for prosecuting the action," though the relator may "continue as a party . . . ." *Id.* § 3730(c)(1). If the Government "elects not to proceed" with the action, "the [relator] shall have the right to conduct the action," but the Government, upon request, must be served with pleadings and deposition transcripts. *Id.* § 3730(c)(3). If the relator "proceeds" with the action, "the court, without limiting the status and rights of the [relator], may nevertheless permit the Government to intervene at a later date upon a showing of good cause." *Id.* Regardless of whether the Government proceeds with the action, "upon a showing by the Government that certain actions of discovery by the [relator] would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days." *Id.* § 3730(c)(4). The Government is entitled to most of the recovery – at least 75% if the Government proceeds with the action, and at least 70% if it does not so proceed – with the balance going to the relator. *Id.* § 3730(d)(1) & (2).

C. Proceedings Below

On January 17, 2003, Petitioner filed a complaint *pro se* in the United States District Court for the Southern District of New York against Respondents alleging claims on behalf of the Government and himself under the FCA's *qui tam* provisions, 31 U.S.C. § 3730(b)(1). Consistent with the FCA and applicable rules, the caption of the complaint named as "Plaintiff" the "United States of America Ex Rel Irwin Eisenstein et al." (JA 23.) *See* 31 U.S.C. § 3730(b)(1);[5] Fed. R. Civ. P. 17(a)(1) ("An action must be prosecuted in the name of the real party in interest.");[6] *see also* Fed. R. Civ. P. 10(a) ("The title of the complaint must name all the parties . . . .").

Pursuant to 31 U.S.C. § 3730(b)(4)(B), the Government declined to take over the action. In its "Notice of Election to Decline Intervention," filed in the district court, the Government "refer[red] the Court to 31 U.S.C. § 3730(b)(1), which allows the relators to maintain the action in the name of the United States . . . ." (JA 46-47.) In the Notice, the Government asserted its rights to give written consent for any dismissal or settlement, to be served with all

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[5] *See United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr.,* 961 F.2d 46, 48 (4th Cir. 1992) (because of naming requirement in § 3730(b)(1), plaintiff in case was " 'United States ex rel. Kathryn Milam' ").

[6] *See, e.g., Milam,* 961 F.2d at 48-50 (in *qui tam* action, Government is real party in interest regardless of whether it intervenes); Point I.A., *infra.*

pleadings, and to intervene in the action for good cause at a later date. (*Id.*) The Government reserved its right to order deposition transcripts. (*Id.*)

On May 29, 2003, Respondents moved to dismiss the complaint for failure to state a claim. In a Memorandum and Order dated March 30, 2006, the district court granted the motion and dismissed the complaint. (Pet. App. 16a-43a.) Judgment was entered on April 12, 2006. (JA 5; Pet. App. 4a.) Petitioner filed a notice of appeal *pro se* on June 5, 2006 – 54 days after entry of judgment. (JA 6, 51; Pet. App. 4a.)[7]

On December 6, 2006, some six months after the notice of appeal was filed, the Second Circuit, on its own motion, questioned the timeliness of the appeal and directed Petitioner to respond. (JA 10.) Prior to that point, no issue of timeliness had been raised by either Respondents or the Government. (JA 9-10.) By order dated December 26, 2006, the Second Circuit directed "the parties and the United States" to brief the issue of whether the 30-day or the 60-day deadline for filing a notice of appeal, *see* Fed. R. App. P. 4(a)(1), applies in a *qui tam* action where the Government has declined to intervene. (JA 56-57.)

On January 25, 2007, Respondents moved to dismiss the appeal for lack of jurisdiction on the ground that the notice of appeal was not timely filed.

[7] The notice of appeal specifically stated that the Government was a "party." (JA 52.) The Government was served with a copy of the notice of appeal. (JA 53.)

(JA 11; Pet. App. 5a.) Respondents argued that, because the Government declined to intervene in the action, the 30-day deadline under Rule 4(a) applied. (Pet. App. 2a, 5a.)

By order dated March 5, 2007, the Second Circuit *sua sponte* directed the appointment of *pro bono* counsel to Petitioner, only for purposes of the motion, to brief, *inter alia,* the timeliness issue. (JA 59.) The Second Circuit appointed such *pro bono* counsel on May 30, 2007. (JA 60-61; Pet. App. 5a.)

On October 1, 2007, *pro bono* counsel filed an opposition memorandum arguing that, regardless of whether the Government declines to intervene, the Government is a party in all *qui tam* actions and that the plain meaning of Rule 4(a)(1)(B) mandates application of the 60-day deadline. (JA 17.) On November 9, 2007, the Government filed an *amicus* brief in support of Respondents.[8] (JA 18.) In its brief, the Government argued that it is not a party to a *qui tam* action where it has declined to intervene and that the instant notice of appeal, which was filed beyond the

[8] Previously, the Government took the opposite position, arguing that, even after declination, the Government is a party for purposes of the 60-day deadline and citing *Haycock* with approval. *See infra* at 27 n.17. As far as the six circuit decisions on point reveal, *see supra* at 4, the instant case is the only one of the six in which the Government submitted an *amicus* brief or mentioned any timeliness issue. Only after the Second Circuit directed briefing by the Government did the Government raise the timeliness issue below. (Pet. App. 5a.)

30-day deadline set forth in Rule 4(a)(1)(A), was untimely.

D. The Second Circuit's Decision

On August 19, 2008, the Second Circuit granted Respondents' motion and dismissed the appeal as untimely. The court concluded that, "when the government fails to intervene or to raise or resist any legal claim," it is not a party under Rule 4(a)(1)(B) and that the instant notice of appeal should have been filed within the 30-day period under Rule 4(a)(1)(A). (Pet. App. 7a.) In support of that conclusion, the court held:

> As used in Rule 4(a)(1), the word "party" refers to the person participating in the proceedings with control over litigation. The government, once having declined to intervene at the outset of an action may not participate in it, save for asking that it be served with pleadings and for approving any withdrawal with prejudice, without moving to intervene upon a showing of good cause. The inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation.

(Pet. App. 8a.)

Relying on the 1946 Advisory Committee's Notes to Rule 4(a)(1)(B)'s predecessor, the Second Circuit also held that the rationale for applying the 60-day

deadline "is obviously inapplicable to the present case" because "the government has played no role in the underlying litigation . . . ." (Pet. App. 11a.) The Notes state that the Government's slow decision-making processes require more than the usual 30 days in which to appeal, and that, in fairness, other parties should have the same time to appeal in a case where the Government is a party. (Pet. App. 10a-11a (citing discussion of Notes in *Russell,* 193 F.3d at 306).)

The Second Circuit also relied on *Petrofsky.* There, a divided panel of the Tenth Circuit held that, following declination, the Government's participation in a *qui tam* action is "'tangential or nominal,'" and that, since all parties were aware that the Government "'disclaimed any participation in the suit,'" there was no need for more than the usual 30-day filing period. (Pet. App. 15a (quoting *Petrofsky,* 588 F.3d at 1329).)

The Second Circuit acknowledged that "our holding in this matter puts us in conflict with three of the four courts of appeals that have considered the issue."[9] (Pet. App. 13a.) With the recent *Rodriguez* decision, the weight of authority has tilted even further away from the Second Circuit's holding in this case.

[9] Notwithstanding the present circuit split (which *Rodriguez* has now deepened), the Second Circuit held that "there is little history of confusion" on the issue herein. (Pet. App. 14a.)

SUMMARY OF ARGUMENT

Even in a declined *qui tam* action under the FCA, the Government is a real party in interest. It owns the claims alleged and is entitled to the bulk of any recovery. Moreover, the action is brought on the Government's behalf and may not be settled or voluntarily dismissed without the Government's consent. Insofar as anything more is required to justify application of the 60-day deadline here, the four circuits applying that deadline have given great, even dispositive, weight to the identification of the Government as the plaintiff in the filings and caption of the *qui tam* action. Far from depending on the relator's whim, such identification is mandated by the naming requirement in both the FCA and Federal Rule of Civil Procedure 17(a). That requirement, though formal and simple, critically ensures that the Government is bound by any judgment. Identification of the Government as the plaintiff in the filings and caption – a result of the naming requirement – is the only condition necessary to render the Government, as a real party in interest here, a "party" under Rule 4(a)(1)(B).

Because procedural rules must be read to avoid "traps for the unwary," four of the six circuits to address the issue have held that a literal reading of Rule 4(a)(1) warrants application of the 60-day deadline. A holding by this Court in favor of the 30-day deadline would not eliminate confusion: The identification of the Government, even after declination, as the plaintiff in the filings and caption of a *qui tam*

action would always be a trap for the litigant who reads and relies on the rules to determine the applicable appellate filing deadline. If there has been confusion among circuit panels on this issue, then surely there will be confusion among litigants who apply Rule 4(a)(1) with their case filings and caption in mind. Only a holding in favor of the 60-day deadline will eliminate confusion.

The Second Circuit's holding is fatally flawed. The court's definition of "party," relying on such imprecise concepts as "participation" and "control," is too uncertain to determine a jurisdictional filing deadline. In addition, the court cited no support for this definition and relied on an *ipse dixit*, asserting that an inability to participate in litigation without moving to intervene therein is not consistent with being a party. In the *qui tam* context, the premise of the assertion is mistaken: To protect its continuing interests after declination, the Government has significant rights to participate in and control the *qui tam* action, without ever intervening. Furthermore, the court's decision ignores the Government's participation in and control of the *qui tam* action during the sealing period, in which the Government investigates the relator's allegations before electing to proceed or decline. Nor should intervention be the test of "party" status, because, even without intervening in the *qui tam* action, the Government has rights typically possessed by parties.

The Second Circuit also mistakenly concluded that the rationale for the 60-day deadline – to

accommodate the slow pace of Government decision-making – is inapplicable in a declined *qui tam* action. Demonstrably, the Government may seek to appeal even without intervening; therefore, the rationale is applicable and favors the 60-day deadline. Declination does not necessarily indicate a lack of governmental interest in the merits of *qui tam* claims.

The Tenth Circuit's split decision in *Petrofsky,* on which the Second Circuit relied below, was based on a version of the FCA pre-dating the 1986 amendments. Those amendments and subsequent case law materially increased the Government's rights to participate in and control the *qui tam* action following declination. Except for the Second Circuit's decision here, every circuit to address the issue following the 1986 amendments has applied the 60-day deadline in a declined *qui tam* action.

ARGUMENT

I. Even Where the Relator, Not the Government, Conducts the *Qui Tam* Action, the Government Is a "Party" Because It Is a Real Party in Interest and, by Statute and Rule, Is Identified as the Plaintiff in All Filings

Rule 4(a)(1)(B) provides that, when "the United States . . . is a party, the notice of appeal may be filed by any party within 60 days after" entry of judgment. Where the Government does not proceed with a *qui*

tam action, and the relator instead conducts the action for the Government, the Government is still a "party" under Rule 4(a)(1)(B). As an initial matter, the Government is still a real party in interest. The claims in the case still belong to the Government, and the Government is still entitled to the lion's share of the proceeds. The question is what other condition, if any, must be satisfied in order for the Government, as a real party in interest, to be a "party." Contrary to the Second Circuit's holding that the Government must also "participat[e] in" and "control" the action (Pet. App. 8a), the only other condition that must be satisfied is compliance with the naming requirement of the FCA and Federal Rule of Civil Procedure 17(a). By mandate of statute and rule, all filings in a *qui tam* action, even after the Government's declination, must identify the Government as the party plaintiff. Though formal, the naming requirement performs the essential function of ensuring that the Government is bound by the judgment. Because that requirement was observed here, the Government was a "party." The Second Circuit's judgment should accordingly be reversed.

A. The Government Is a Real Party in Interest, Even After Declination

In a *qui tam* action under the FCA, even after declination, the Government is a real party in interest. Numerous courts have so held, and Respondents so concede. *See Stoner v. Santa Clara County Office of Ed.*, 502 F.3d 1116, 1126 (9th Cir. 2007) (citing *United*

States v. Schimmels (In re Schimmels), 127 F.3d 875, 882 (9th Cir. 1997), and *United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992)); *United States ex rel. Mergent Servs. v. Flaherty,* 540 F.3d 89, 93 (2d Cir. 2008); Pet. App. 8a (citing *Stoner*); Respondents' Brief in Opposition, dated December 9, 2008, at 8; *see also United States ex rel. Karvelas v. Melrose-Wakefield Hosp.,* 360 F.3d 220, 231 (1st Cir. 2004); *United States ex rel. Joshi v. St. Luke's Hosp., Inc.,* 441 F.3d 552, 560 (8th Cir. 2006); *United States ex rel. Walker v. R&F Properties of Lake County, Inc.,* 433 F.3d 1349, 1359 (11th Cir. 2005); *Russell,* 193 F.3d at 307.

The Government remains a real party in interest because "the underlying claim of fraud *always* belongs to the government." *Stoner*, 502 F.3d at 1126 (emphasis added). Because the relator is effectively the partial assignee of "the *Government's* damages claim," *Vermont Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 773 & n.4 (2000) (emphasis added), the unassigned portion of that claim maintains the Government's status as a real party in interest. The FCA elsewhere refers to the claim as the Government's, stating that, notwithstanding the *qui tam* provisions, "the Government may pursue *its* claim through any available remedy . . . ." 31 U.S.C. § 3730(c)(5) (emphasis added) (cited in *Stoner,* 502 F.3d at 1126). Furthermore, the relator brings the action for himself "and for the United States Government." 31 U.S.C. § 3730(b)(1) (cited in *Stoner,* 502 F.3d at 1126). Even after declination, the Government is entitled to most of the recovery – at

least 70%, *see* 31 U.S.C. § 3730(d)(1) & (2); *see, e.g., Flaherty,* 540 F.3d at 93 – and the action may not be settled or voluntarily dismissed without the Government's consent, *see United States ex rel. Ridenour v. Kaiser-Hill Co.,* 397 F.3d 925, 931 n.8 (10th Cir. 2005); *United States ex rel. Doyle v. Health Possibilities, P.S.C.,* 207 F.3d 335, 336 (6th Cir. 2000); *Searcy v. Philips Electronics N. Am. Corp.,* 117 F.3d 154, 158-60 (5th Cir. 1997) (rejecting *United States ex rel. Killingsworth v. Northrop Corp.,* 25 F.3d 715, 722-23 (9th Cir. 1994)); *Milam*, 961 F.2d at 49; *see also Rodriguez,* 552 F.3d at 301 (collecting cases).

Furthermore, regardless of intervention, the claims in a *qui tam* action uniquely concern the Government, as the injury at issue is always to the Government's property and sovereignty. *See Stevens,* 529 U.S. at 771. The FCA authorizes recovery for damage caused to the Government. *See* 31 U.S.C. § 3729(a) (imposing liability for "damages which the Government sustains because of [a violation]"). The FCA has been applied to a range of federal programs. *See, e.g., Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 942-43 (1997) (defense procurement); *Cook County, Ill. v. United States ex rel. Chandler,* 538 U.S. 119, 123-24 (2003) (treatment for drug abuse); *Stevens,* 529 U.S. at 770 (environmental protection). Thus, even after declination, the Government's presence in a *qui tam* action is pervasive. *Cf. Russell*, 193 F.3d at 308 ("the government is ever present in *qui tam* suits").

B. The Only Other Requirement for "Party" Status Is Compliance with the Naming Requirement of the FCA and Rule 17(a)

The four circuits applying the 60-day deadline in a declined *qui tam* action all focus on the Government's substantive interest in the case. *See Rodriguez,* 552 F.3d at 301-02; *Lu,* 368 F.3d at 775; *Russell,* 193 F.3d at 307; *Haycock,* 98 F.3d at 1102. However, insofar as that interest is necessary but not sufficient to justify application of the 60-day deadline, these four circuits also focus on a formal factor: that the Government is identified as the plaintiff in the filings of the case.[10] *See Rodriguez,* 552 F.3d at 302 (citing *Lu,* 368 F.3d at 775; *Russell,* 193 F.3d at 307-08; *Haycock,* 98 F.3d at 1102). These courts find such identification weighty, even dispositive. Thus, the *Rodriguez* court held, "We . . . join our colleagues in the Fifth, Seventh and Ninth Circuits in finding significant that, even when it declines to intervene, the United States remains a party to a *qui tam* action in the literal sense, *i.e.,* its name is on the caption." *Rodriguez,* 552 F.3d at 302.

Such identification is not happenstance. It is mandated by the FCA's naming requirement. *See* 31 U.S.C. § 3730(b)(1) ("The [*qui tam*] action shall be brought in the name of the Government."). The Ninth Circuit so held in *Haycock*: "[The Government's] name

[10] Circuits applying the 60-day deadline also note the need for clarity in rule interpretation, discussed in Point II, *infra.*

is on all papers as the plaintiff, *as it must be under the controlling statute*." 98 F.3d at 1102 (quoting 31 U.S.C. § 3730(b)(1)) (emphasis added). Moreover, the naming requirement applies even after the Government declines to intervene.[11]

The naming requirement is not merely a technical rule of pleading. Rather, by mandating that the Government be identified in case filings as a plaintiff, the requirement performs the important function of ensuring that the Government is bound by the judgment and that the defendant is protected from subsequent civil litigation by the Government following entry of judgment.[12] *See Stoner,* 502 F.3d at 1126 (citing cases). The requirement is no less important because it is formal and easily met.

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[11] Nothing in the FCA suggests that the requirement ceases to apply once the Government declines intervention. Indeed, in the instant case, the Government's notice of declination notes the requirement that the relator will "maintain the action in the name of the United States." (JA 47 (Government's declination notice, citing 31 U.S.C. § 3730(b)(1)).) FCA practice is in accord. *See, e.g., Lu,* 368 F.3d at 773 (caption identifying Government as plaintiff even after declination).

[12] The naming requirement also *protects* the Government. For example, if, after the Government's declination, the relator litigates and wins, the naming requirement ensures that the judgment will award money *to the Government*. If, by contrast, the FCA contained no naming requirement (and neither did Rule 17(a)), and the relator brought the action in his own name and won, then the judgment could award money *solely to the relator*. To obtain its statutory share in that case, the Government, instead of obtaining immediate satisfaction (or at least a judgment on which it could promptly execute), would then have to pursue the relator.

The identification of the Government as the plaintiff in a *qui tam* action, regardless of declination, also results from the naming requirement in Federal Rule of Civil Procedure 17(a), which provides: "An action must be prosecuted in the name of the real party in interest." In applying this requirement, courts routinely hold that the real party in interest must be identified in the pleadings as the plaintiff. *See, e.g.*, *Frommert v. Conkright,* 535 F.3d 111, 120 (2d Cir. 2008) ("Defendants-Appellants are not the parties *prosecuting* this action; that role belongs to Plaintiffs-Appellees. . . . The real party in interest principle . . . directs attention to whether [the] *plaintiff* has a significant interest in the particular action he has instituted, and Rule 17(a) is limited to *plaintiffs*." (brackets, citation, and internal quotation marks omitted) (some emphases added)); *Rawoof v. Texor Petroleum Co.,* 521 F.3d 750, 756 (7th Cir. 2008) ("Under Rule 17(a) we are concerned only with whether an action can be maintained in the *plaintiff's name* . . . ." (emphasis added)); *Wayne v. Martinez,* 58 Fed. Appx. 685, 2003 WL 186649, at *1 (9th Cir. Jan. 21, 2003) (affirming dismissal under Rule 17(a): "The complaint does not name David Struckman *as a plaintiff*, even though he is identified throughout the pleadings as the real party in interest." (emphasis added)).[13] Moreover, Rule 17(a)'s

[13] *See also Payne v. McKune,* No. 06-3010-JWL, 2007 WL 1019193, at *2 (D. Kan. Apr. 4, 2007) ("The second amended complaint, which names Ms. Payne, as the administrator of Mr. Brown's estate *as a plaintiff,* solves the real party in interest . . . issue[ ]. . . ." (emphasis added)); *Gatto v. MacMillan,* No. Civ. A.

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naming requirement, like the FCA's, is not simply a rule of pleading nicety. Rather, it similarly ensures that the real party in interest is bound by the judgment in the case and that the defendant is protected from subsequent civil litigation by the real party in interest. *See, e.g., Gogolin & Stelter v. Karn's Auto Imports, Inc.,* 886 F.2d 100, 102 (5th Cir. 1989); *U-Haul Int'l, Inc. v. Jartran, Inc.,* 793 F.2d 1034, 1039 (9th Cir. 1986).

Thus, even apart from the fact that Rule 17(a)'s naming requirement is a guide to the meaning of the FCA's similar requirement, Rule 17(a) is an independent source of obligation: If hypothetically the FCA contained no naming requirement, the Government's status as a real party in interest, even in a declined *qui tam* action, would still require that the action be "in the name of" the Government and hence that the Government be identified in the pleadings as the plaintiff.[14]

96-2910, 1996 WL 648859, at *2 (E.D. Pa. Nov. 8, 1996) ("Rule 17(a) is the proper vehicle for seeking to amend a complaint by substituting the real party in interest *as the plaintiff*. . . . [W]hile Gatto strenuously argues that he is bringing this suit on his mother's behalf, Gatto's mother has never requested this court to substitute her *as plaintiff* in this action." (emphasis added)); *Feist v. Consolidated Freightways Corp.,* 100 F. Supp. 2d 273, 275 (E.D. Pa. 1999) (requirement of prosecution in name of real party in interest "is a means to identify the person who possesses the right sought to be enforced."), *aff'd*, 216 F.3d 1075 (3d Cir. 2000) (Table).

[14] That the Government after declination is still a party finds additional support in Federal Rule of Civil Procedure

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In sum, the *qui tam* claims here belong to the Government, which is uniquely and pervasively present in *qui tam* actions, even after declination. Moreover, the Government was identified as the plaintiff in the case's caption and filings, including the complaint, the Government's notice of declination, and the notice of appeal. (JA 23, 46, 51.) Even if a "real party in interest" is not necessarily a "party" for purposes of Rule 4(a)(1)(B), compliance with the naming requirement in section 3730(b)(1) and Rule 17(a) suffices to convert the real party in interest – which in a *qui tam* action is the Government – into a "party" under Rule 4(a)(1)(B), and that requirement was observed in this case.[15] Thus, under the four circuit decisions on point here, and under section

10(a). Rule 10(a), which provides that the caption of a complaint must have a title, requires that such title "name all the parties . . . ." Fed. R. Civ. P. 10(a). The Third Circuit in *Rodriguez,* though not citing Rule 10, evidently had Rule 10(a)'s requirement in mind when it held that the Government, even after declination, "remains a party to a *qui tam* action in the literal sense, *i.e., its name is on the caption.*" 552 F.3d at 302 (emphasis added).

[15] *See Milam*, 961 F.2d at 48 (holding, for Eleventh Amendment purposes, that Government's status as real party in interest, along with identification of Government as plaintiff in case title pursuant to naming requirement in FCA and Rule 17(a), rendered Government "the real plaintiff"); *see also United States ex rel. Hall v. Tribal Dev. Corp.*, 49 F.3d 1208, 1209-12 (7th Cir. 1995) (holding, for purposes of former *qui tam* provision of 25 U.S.C. § 81, that Government's substantive interest in case, along with identification of Government as plaintiff in case title pursuant to naming requirement in § 81 and Rule 17(a), rendered Government "the real plaintiff").

3730(b)(1) and Rule 17(a), the Government was a "party" for purposes of Rule 4(a)(1)(B). The 60-day rule therefore applied, and the notice of appeal herein was accordingly timely.

II. The Need for Clarity in Rule Interpretation Favors Application of the 60-Day Rule Here

Because the naming requirement mandates identification of the Government as the party plaintiff in the filings and caption, any holding in favor of the 30-day deadline will not eliminate confusion as to the applicable filing deadline. Only a holding in favor of the 60-day deadline will eliminate confusion.

Procedural rules must be interpreted to avoid "traps for the unwary." *Russell,* 193 F.3d at 308. Courts should "avoid any reading likely to cause confusion." *Rodriguez*, 552 F.3d at 302. As the Ninth Circuit held in *Haycock,* what matters more than whether the 30-day or 60-day rule applies is whether "the unsuccessful party in district court [can] figure out which time period applies, easily, without extensive research, and without uncertainty." 98 F.3d at 1102. All four circuit decisions cited above – *Haycock, Rodriguez, Lu,* and *Russell* – have observed that a literal reading of Rule 4(a)(1) militates in favor of applying the 60-day rule. *See Haycock,* 98 F.3d at 1102 ("A literal interpretation of the rule achieves this important purpose."); *Rodriguez,* 552 F.3d at 302 ("Applying the shorter deadline may confuse litigants

who, based on a literal reading [of] Rule 4(a)(1), assume that the longer deadline applies."); *Lu,* 368 F.3d at 775 ("These decisions also note the trap for the unwary that would be created by giving Rule 4(a)(1) a nonliteral interpretation . . . ."); *Russell,* 193 F.3d at 308 ("[W]e are persuaded by the *Haycock* court's view . . . ."). Under these authorities, the 60-day rule should apply here.

Though one might conclude that a holding by this Court in favor of the 30-day rule will be sufficient to dispel confusion, such a conclusion is belied by the fact that the Government must *always* be named as a plaintiff in the caption of a *qui tam* action, even after declination. Thus, confusion will always plague those litigants who read and rely on the rules to determine the applicable filing period. The question is not whether this Court has the ultimate power to declare the law; that power is undisputed. The question, rather, is whether there will be a "trap for the unwary" or a "likel[ihood of] confusion" even following a holding by this Court in favor of the 30-day rule. Because statute and rule require the Government to be identified in the filings and caption as a party plaintiff, the answer to this question is yes. The answer is made emphatic by the fact that confusion on this issue has snared not only *pro se* litigants but counsel as well.[16] Even the current split in the circuits

[16] The notice of appeal in *Rodriguez* was filed by counsel to the relator. *See* Notice of Appeal, *Rodriguez v. Our Lady of*

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demonstrates a history of confusion at the judiciary's highest levels – with four circuit decisions evidencing the gravitational pull that the literal command of the rules will continue to have in declined *qui tam* actions.[17]

Moreover, the reason for having a code of rules is to minimize the need for research, *see Haycock,* 98 F.3d at 1102, and to provide an authority that "easily" affords a " 'speedy[] and inexpensive' " determination of the applicable law, *see Russell,* 193 F.3d at 307-08 (citing Fed. R. Civ. P. 1). Given that a literal reading of the rules militates in favor of the 60-day period, *see, e.g., Haycock,* 98 F.3d at 1102; *Rodriguez*, 552 F.3d at 302; *Lu,* 368 F.3d at 775, an affirmance here would contravene the purpose of the rules. The judgment below should therefore be reversed.

Lourdes Medical Center, 06-cv-0129 (RBK) (D.N.J.) (docket no. 17) (available on Pacer).

[17] It is difficult to overstate the potential for confusion. The Government's role here is *sui generis*; the Third Circuit described the Government's relationship to the *qui tam* action as "neither fish nor fowl," *Rodriguez,* 552 F.3d at 301. Even the Government has taken opposing positions, arguing below that, after declination, the Government is not a party under Fed. R. App. P. 4(a)(1)(B), *see* Brief for the United States of America as *Amicus Curiae* in Support of Defendants-Appellees at 2-3, *United States ex rel. Eisenstein v. City of New York et al.* (2d Cir. 2007) (No. 06-3329-cv), while arguing in *Searcy* that, after declination, the Government "remains 'a party for purposes of the sixty day notice of appeal rule,' " Brief for the Appellant United States of America, *Searcy v. Philips Electronics N. Am. Corp.* (5th Cir. 1996) (No. 96-40515), 1996 WL 33439979, at *13 (Oct. 25, 1996) (quoting *Haycock*).

III. The Second Circuit Misdefined the Term "Party" and Misunderstood FCA Intervention

A. The Second Circuit's Definition of "Party" Is Incorrect

A misunderstanding of FCA intervention and of the Government's rights absent such intervention led the Second Circuit to define "party" as "the person participating in the proceedings with control over litigation." (Pet. App. 8a.) For several reasons, that definition is incorrect.

First, a "party" – or at least the plaintiff – in a *qui tam* action is the entity that, because of statute and rule, is identified in the filings and caption as the plaintiff, even following declination. *See* Point I, *supra*. This definition, aside from the logic and case law that support it, has the advantage of being easily understood and applied. *See* Point II, *supra*; *Haycock,* 98 F.3d at 1102; *Russell,* 193 F.3d at 307-08; *Rodriguez,* 552 F.3d at 302; *Lu,* 368 F.3d at 775.

Second, and relatedly, the Second Circuit's hazy definition of "party" – relying on concepts of "participation" and "control" – is ill-suited to determine a jurisdictional filing deadline. As the Seventh Circuit stated in *Lu,* a jurisdictional determination should not be based on "uncertain inquiries," such as "what is the named party's *real* interest in the case?," *Lu,* 368 F.3d at 775, or, to recast the question in terms of the holding below, "how much did the named party

participate in and control the litigation?" The Government has any number of powers to participate in and control a *qui tam* action, even after declination. *See infra* at 31. It would be an administrative nightmare for parties and the courts if the existence of appellate jurisdiction depended on factual issues that could arise after declination, such as whether and to what extent the Government sought dismissal of the relator's claims,[18] requested service of pleadings and deposition transcripts,[19] opposed a proposed settlement,[20] and obtained a stay of the relator's discovery.[21]

Further complications arise if the Government intervenes at the end of the district court litigation. Under the participation and control test, it is highly debatable whether the Government, after intervention, meaningfully participated in or controlled such litigation, especially when the relator alone litigated

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[18] *See Ridenour,* 397 F.3d at 932; *Juliano v. Federal Asset Disposition Ass'n,* 736 F. Supp. 348, 351 (D.D.C. 1990) (Government sought dismissal of some, but not all, of defendants named in relator's complaint), *aff'd*, 959 F.2d 1101 (D.C. Cir. 1992) (Table).

[19] *See* 31 U.S.C. § 3730(c)(3); JA 47 (Government's declination notice, which requested service of pleadings but not deposition transcripts).

[20] *See* 31 U.S.C. § 3730(b)(1); *Searcy,* 117 F.3d at 155-56 (Government opposed not amount of settlement but rather wording of release).

[21] *See* 31 U.S.C. § 3730(c)(4); *United States ex rel. McCoy v. California Medical Review, Inc.,* 715 F. Supp. 967, 968 (N.D. Cal. 1989) (describing stays of varying scope).

(perhaps for years) and tried the case. The doubt concerning the significance of the Government's participation and control following late intervention is implicitly recognized by the FCA, which, when the Government after declination seeks to intervene for good cause, permits such late intervention but "without limiting the status and rights of the [relator]." 31 U.S.C. § 3730(c)(3).

Even apart from such factual debate, one must acknowledge that the likelihood of legal debate – *i.e.,* about whether the Government *could,* rather than *did,* participate and control following declination – renders the Second Circuit's definition of "party" too "uncertain" to be a workable test for appellate jurisdiction. *See Helm v. Resolution Trust Corp.,* 18 F.3d 446, 447 (7th Cir. 1994) ("Jurisdictional rules should be as clear *and mechanical* as possible." (emphasis added)).

Third, nothing on the face of the appellate rules authorizes or supports the Second Circuit's definition of the term "party," and the Second Circuit cited no authority therefor. (*See* Pet. App. 8a.) Instead, positing that the Government after declination may not participate in the *qui tam* action without moving to intervene, the Second Circuit simply asserted that "[t]he inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation." (*Id.*)

The assertion's premise – that, like a private litigant, the Government is unable to participate

without moving to intervene – is erroneous in the *qui tam* context. Even without moving to intervene, the Government, to protect its continuing interests in the case, has numerous rights to participate in and control the declined *qui tam* litigation. *See Rodriguez,* 552 F.3d at 301 ("Even when the Government declines to intervene initially, it still retains the right to continue involvement in the case in various ways."). The action may not be settled or voluntarily dismissed without Government approval. 31 U.S.C. § 3730(b)(1); *Ridenour,* 397 F.3d at 931 n.8; *Doyle,* 207 F.3d at 336; *Searcy,* 117 F.3d at 158-60; *Milam*, 961 F.2d at 49; *Rodriguez,* 552 F.3d at 301; *supra* at 19. The Government may move to dismiss. *Ridenour,* 397 F.3d at 932; *id.* at 933-34 (citing cases). The Government upon request must be served with all pleadings and deposition transcripts. 31 U.S.C. § 3730(c)(3). The Government is entitled to the bulk of the monetary recovery. *Lu,* 368 F.3d at 775; *Rodriguez,* 552 F.3d at 301 (Government entitled to at least 70% of recovery even after declination); 31 U.S.C. § 3730(d)(1) & (2). The Government may obtain a stay of any discovery by the relator that would interfere with the Government's pursuit of claims arising from the same facts. 31 U.S.C. § 3730(c)(4). The judgment will be in the name of, and will bind, the Government. *See, e.g.,* Judgment, *United States ex rel. Harrison v. Westinghouse Savannah River Co.,* CA 1:94-cv-02332-CMC (D.S.C. July 24, 2002) (docket no. 189) (available

on Pacer); *Searcy,* 117 F.3d at 157. By any reasonable definition, these factors evidence "participati[on]" and "control."[22] Indeed, as the Government itself noted below, the Second Circuit previously held that, after declination, the Government "retains significant *control* over the action."[23] *United States ex rel. Stevens v. State of Vermont Agency of Natural Res.,* 162 F.3d 195, 201 (2d Cir. 1998), *rev'd on other grounds,* 529 U.S. 765 (2000) (emphasis added); *see* Brief for the United States of America as *Amicus Curiae* in Support of Defendants-Appellees at 8, *United States ex rel. Eisenstein v. City of New York et al.* (2d Cir. 2007) (No. 06-3329-cv) (citing *Stevens,* 162 F.3d at 201); *see also United States ex rel. Zissler v. Regents of Univ. of Minn.,* 154 F.3d 870, 872 (8th Cir. 1998) (referring to

[22] For this reason, the Second Circuit was inaccurate in asserting that, after declination and without moving to intervene for good cause, the Government may not participate "save for asking that it be served with pleadings and for approving any withdrawal with prejudice." (Pet. App. 8a.) The court simply ignored the Government's rights to seek dismissal, to be served with deposition transcripts, to limit the relator's discovery, to obtain most of the recovery, and to be named in the judgment. *See supra* at 31-32.

[23] The Second Circuit's "control" test for "party" status is also inconsistent with the FCA provisions concerning the relator's status following Government intervention. Once the Government elects to intervene, the Government, not the relator, "conduct[s]" the action, 31 U.S.C. § 3730(b)(4)(A), has "primary responsibility for prosecuting the action," *id.* § 3730(c)(1), and is "not . . . bound" by any act of the relator, *id.* Tellingly, however, the relator continues as a "party." *Id.* Thus, the FCA itself demonstrates that one can be a party without having "control" of the *qui tam* action.

"'the extensive power the government has to control the litigation'" even after declination (quoting *Milam,* 961 F.2d at 49)). Thus, the Second Circuit was mistaken in stating that the Government here was "[unable] to participate without moving to intervene." (Pet. App. 8a.)

Similarly, the Second Circuit's decision fails to acknowledge the Government's participation in and control over the *qui tam* action during the 60-day investigative period between service of the relator's *qui tam* complaint on the Government and the Government's initial election to proceed or decline. *See* 31 U.S.C. § 3730(b)(4)(A) & (B) (during 60-day period, Government must "proceed with the action" or "notify the court that it declines to take over the action"); *United States ex rel. Kelly v. Boeing Co.,* 9 F.3d 743, 746 (9th Cir. 1993) (observing that Government uses 60-day period to investigate relator's claims). As a preliminary matter, the FCA requires that the *qui tam* complaint be "served" on the Government under Rule 4 of the Federal Rules of Civil Procedure, *see* 31 U.S.C. § 3730(b)(2) – a requirement demonstrating Congress's view that the Government is a party to the litigation from the outset. The Government may then seek extensions of the decision period. *Id.* § 3730(b)(3). The Government may investigate and gather evidence. *Kelly,* 9 F.3d at 746. No one other than the Government may intervene. 31 U.S.C. § 3730(b)(5). The Government's discretion to decide whether to proceed or to decline is unrestricted. *See id.* § 3730(b)(2) & (4). The Government

may also settle or dismiss the case without the relator's approval. *Swift v. United States,* 318 F.3d 250, 252-53 (D.C. Cir. 2003).[24] Thus, putting aside the post-declination period, the Government participates in and controls proceedings during the 60-day investigative period. *See Rochester Methodist Hosp. v. Travelers Ins. Co.*, 728 F.2d 1006, 1010-12 (8th Cir. 1984) (holding Government "party" under Fed. R. App. P. 4 because Government had been party in district court, regardless of whether it was party when judgment entered).[25]

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[24] The *Swift* court made two other relevant holdings. First, in support of the conclusion that the Government has an unfettered right to dismiss a *qui tam* action even before its initial election, the court cited Fed. R. Civ. P. 41(a)(1), which permits a "plaintiff" to dismiss a civil action without a court order if the adverse party has not answered or moved for summary judgment. *See* 318 F.3d at 252; Fed. R. Civ. P. 41(a)(1)(A)(i). Clearly, the court considered the Government a "plaintiff" – that is, a party – even though the Government had not yet made its initial election. Second, in discussing the Executive's discretion to decide whether to bring an action on behalf of the Government, the court stated that nothing in 31 U.S.C. § 3730(c)(2)(A) "purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States." 318 F.3d at 253. Thus, by not moving to dismiss during the investigative period, the Government makes an affirmative decision to have the *qui tam* action "go forward in the name of the" Government – a clear act of participation and control.

[25] The two circuit courts holding in favor of the 30-day appellate deadline based their holdings on the assertion that "'the government [has] disclaimed any participation in the suit . . . .'" (Pet. App. 15a (quoting *Petrofsky,* 588 F.2d at 1329).)

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B. Intervention Should Not Be the Test of "Party" Status

Similarly, intervention itself, as opposed to participation and control, should not be the test of "party" status under Rule 4(a)(1)(B).[26] Intervention under the FCA is manifestly different from intervention otherwise. One who declines to intervene in a non-FCA case has none of the above-described rights of participation and control that the Government, without moving to intervene, has in a declined *qui tam* action. Indeed, one who declines to intervene in a non-FCA case is generally a stranger to the action, unbound by the judgment and unentitled to share in the recovery, to seek dismissal, to be served with pleadings and transcripts, to veto a settlement or dismissal, or to obtain a stay of discovery that interferes with pursuit of the non-intervenor's own claims.

Neither court, however, addressed the 60-day investigative period. Nor did either court acknowledge that, once service is effected upon a person identified in the complaint as a party, the degree of the person's participation is irrelevant to whether the person was a party; a defendant who was served and defaulted was still a party, notwithstanding the default. *See* Fed. R. Civ. P. 55(a) (when "party" fails to plead or otherwise defend, clerk must enter "the party's default").

[26] To be clear, the Second Circuit's holding was that the test for "party" status is not whether the Government has intervened, but rather whether the Government participates in and controls the litigation. (Pet. App. 8a.) In Petitioner's view, the Government, even under the test of participation and control, was a "party" here, for the reasons discussed in the text above.

See generally Martin v. Wilks, 490 U.S. 755, 763 (1989), *superseded by statute on other grounds, see United States v. Andrews,* 146 F.3d 933, 938 n.5 (D.C. Cir. 1998). In an FCA case, by contrast, the Government, without intervening, has all of these powers, which are typically possessed by parties. Thus, in an FCA case, the Government's party-peculiar rights absent intervention make intervention an unsuitable test for "party" status.[27]

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[27] Intervention under the FCA, though not determinative of "party" status under Fed. R. App. P. 4(a)(1)(B), does determine issues of litigation management, such as who may decide the pace and scope of discovery. *Searcy,* 117 F.3d at 160 ("conduct" of action includes executing discovery, as well as devising strategy and arguing in court, but not negotiating settlement). For this reason, the FCA indicates that the Government's decision to intervene *vel non*, *see* 31 U.S.C. § 3730(b)(2), determines who will "conduct" the action, *id.* § 3730(b)(4), and that, in the conduct of the action, principal issues will be "the number of witnesses" to be called, "the length of testimony of such witnesses," "cross-examination of witnesses," *id.* § 3730(c)(2)(C)(i)-(iii), and whether "discovery by the [relator]" will interfere with the Government's pursuit of claims arising from the same facts, *id.* § 3730(c)(4). Nor would a holding that the Government is a "party" under Fed. R. App. P. 4(a)(1)(B) cause the Government, following declination, to be subject to discovery under Fed. R. Civ. P. 26-37. Indeed, in *Searcy,* the Government argued both that it should be treated as a party for purposes of appeal (citing *Haycock*) and that declination barred it from being treated as a party for purposes of discovery. *See* Brief for the Appellant United States of America, *Searcy v. Philips Electronics N. Am. Corp.* (5th Cir. 1996) (No. 96-40515), 1996 WL 33439979, at *13-14 (Oct. 25, 1996); Reply Brief for the Appellant United States of America, *Searcy v. Philips Electronics N. Am. Corp.* (5th Cir. 1997) (No. 96-40515), 1997 WL 33562499, at *17-18 (Jan. 2,

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C. The Rationale for the 60-Day Deadline Is Applicable Here

In the decision below, the Second Circuit, relying on the 1946 Advisory Committee's Notes to Rule 4(a)(1)(B)'s predecessor, held that the rationale for the 60-day appellate deadline – *i.e.,* the slowness of the Government's decision-making process regarding whether to appeal – is inapplicable in a declined *qui tam* action. (Pet. App. 10a-11a.) This holding is erroneous.

Where procedural rules are clear on their face, advisory committee notes "cannot be allowed to contradict the express language of a Rule . . . ." *United States v. Nahodil,* 36 F.3d 323, 328 (3d Cir. 1994). As the courts in *Rodriguez, Lu, Haycock,* and *Russell* have held, a "literal" reading of Rule 4(a)(1)(B) favors application of the 60-day deadline. *See* Point II, *supra*. Accordingly, these four holdings demonstrate that there is no need to resort to the Advisory Committee's Notes and hence to any discussion of the rationale underlying the 60-day deadline.

In any event, the Second Circuit's holding that the rationale was inapplicable in a declined *qui tam* action is incorrect. The Government in a *qui tam* action may seek to appeal without ever intervening. *See Rodriguez,* 552 F.3d at 302 (citing *Searcy,* 117

1997); *cf. Searcy,* 117 F.3d at 156 ("[V]iewing the government as a party for the purposes of [Fed. R. App. P.] 4(a)(1) does not compel us to treat it as a party for all appellate purposes.").

F.3d at 157). Thus, the *Rodriguez* court explicitly rejected the Second Circuit's rationale-based holding, concluding, "the slowness of the Government continues to be relevant to determining how long the right to appeal should remain available." 552 F.3d at 302.[28]

The Second Circuit's holding appears to have misapprehended the reasons for declination. (*See* Pet. App. 11a (holding rationale for 60-day period "obviously inapplicable to the present case" because "the government has played no role in the underlying litigation").) As numerous courts have held, a declination may be motivated by a variety of issues and does not necessarily indicate a lack of governmental interest in the outcome of the *qui tam* action. *See, e.g., United States ex rel. Williams v. Bell Helicopter Textron, Inc.,* 417 F.3d 450, 455 (5th Cir. 2005) ("The [FCA] . . . does not require the government to proceed

[28] That the Government may seek to appeal without ever intervening – at least prior to entry of judgment – is also demonstrated in *United States ex rel. McGough v. Covington Technologies, Co.,* 967 F.2d 1391, 1392 (9th Cir. 1992). There, the Government sought to appeal even though it never intervened prior to entry of judgment; rather, after such entry, the Government moved to intervene solely for the purpose of appeal. *Id.* at 1393. The Ninth Circuit reversed the district court's denial of the motion to intervene, holding the motion timely because it was made prior to the expiration of the time for filing a notice of appeal. *Id.* at 1394. The *McGough* court did not address the issue of whether the 30-day or 60-day filing deadline applies, apparently because the Government's motion, made 23 days after entry of judgment, *id.* at 1393, was timely under both deadlines.

if its investigation yields a meritorious claim. Indeed, absent any obligation to the contrary, it may opt out for any number of reasons."); *United States ex rel. Chandler v. Cook County, Ill.,* 277 F.3d 969, 974 n.5 (7th Cir. 2002) (noting that declination is not "a commentary on [the] merits" and that Government may have "myriad reasons" for declining, "including limited prosecutorial resources and confidence in the relator's attorney"), *aff'd*, 538 U.S. 119 (2003); *United States ex rel. Berge v. Bd. of Trustees of the Univ. of Ala.,* 104 F.3d 1453, 1458 (4th Cir. 1997) (holding that declination resulted from cost-benefit analysis and was not admission that Government suffered no injury).

D. The Second Circuit's Reliance on *Petrofsky* Was Misplaced

Petrofsky, on which the decision below relied (*see* Pet. App. 15a), provides little support for the Second Circuit's holding.

In the first place, the *Petrofsky* court was sharply divided. The dissent foreshadowed the repeated circuit holdings that a literal reading of applicable law militates in favor of the 60-day rule: "The harm in applying a 30-day requirement is that an appeal is denied because [a litigant] read the statute *literally*. . . ." 588 F.2d at 1329 (Logan, J., dissenting) (emphasis added). The dissent also adumbrated the holding that jurisdictional determinations should not be based on "uncertain inquiries," *Lu,* 368 F.3d

at 775: "I am not anxious to add to our caseload, but believe that the narrow reading 'introduces an element of *uncertainty* in the very critical, because regarded as jurisdictional, area of the time for appeal, and it ought not find favor.'" 588 F.2d at 1329 (Logan, J., dissenting) (emphasis added) (citation omitted).[29]

Furthermore, *Petrofsky* was based on the pre-1986 version of the FCA. *See Searcy,* 117 F.3d at 156. When *Petrofsky* was decided, the FCA authorized significantly less Government participation post-declination than has been the case since the 1986 amendments to the FCA. In the 1986 amendments, Congress added the provisions that, following declination, the Government upon request is entitled to service of pleadings and deposition transcripts and may later intervene for good cause. *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, §§ 3-4, 100 Stat. 3153. Nor, at the time of *Petrofsky*, had any

[29] The dissent, *see* 588 F.2d at 1329, also relied on Judge Friendly's rationale for a broad reading of the predecessor to Fed. R. App. P. 4(a)(1)(B): "It is in the last degree undesirable to read into a procedural statute or rule, fixing the time within which action may be taken, a hidden exception or qualification that will result in the rights of clients being sacrificed when capable counsel have reasonably relied on the language. . . . The stated criterion [in the rule] is whether the United States is a party to the action, a test clearly satisfied here, and not whether the United States is concerned with the particular order sought to be appealed – something that often cannot be accurately determined when the order is made." *United States v. American Society of Composers, Authors and Publishers,* 331 F.2d 117, 119 (2d Cir.), *cert. denied,* 377 U.S. 997 (1964).

court yet decided that, after declination, the Government can seek dismissal of the *qui tam* complaint. *See Ridenour,* 397 F.3d at 933-34 (citing cases). Thus, when *Petrofsky* issued, some of the Government's statutory controls did not yet exist, and case law recognizing certain controls was less developed. At best, *Petrofsky*'s vitality is open to question.[30]

In its decision below, the Second Circuit did not acknowledge that *Petrofsky* was based on a version of the FCA different from that which has existed since 1986. In any event, except for the Second Circuit here, every circuit to address the issue since the 1986 amendments has applied the 60-day deadline in a declined *qui tam* action.

[30] In an unpublished decision, *Shaw v. AAA Eng'g & Drafting Inc.,* 138 Fed. Appx. 62, 75 (10th Cir. 2005), the Tenth Circuit acknowledged both that *Petrofsky* was based on an old version of the statute and that "there are valid arguments in favor of applying the sixty-day rule." *Id.* Nonetheless, failing to see how the FCA's subsequent amendments are relevant to the filing deadline issue, the court concluded, tepidly, that it was still bound by *Petrofsky. Id.*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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February 25, 2009